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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-278

JAMES HUEL CRAVENS and RAYMOND M. TAYLOR,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

JAMES HUEL CRAVENS and RAYMOND M. TAYLOR,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioners, James Huel Cravens and Raymond M. Taylor, defendants-appellants below, respectfully pray that a Writ of Certiorari issue to review the Order entered against them on June 20, 1972, by the United States Court of Appeals for the Sixth Circuit in the case of *United States of America* v. *James Huel Cravens and Raymond M. Taylor* (No. 72-1119) affirming the judgment of the United States District Court for the Western District of Kentucky in *United States* v. *James Huel Cravens, William Glenn Kilgore and Raymond Milton Taylor* (No. 4908).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, infra, Appendix A (p. A1).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Whether petitioners' right of cross-examination secured by the Confrontation Clause of the Sixth Amendment was violated by the admission of an incriminating extrajudicial statement of a co-defendant, over objection, but with limiting instructions to the jury, after which, and at the close of the Government's case, the co-defendant changed his plea to guilty, was removed from the defense table, and was seated at the back of the courtroom; and whether the aforesaid action constituted harmless error.

Whether the denial of a hearing requested by petitioners, pursuant to Rule 41(e) of Federal Rules of Criminal Procedure, violated the due process of law mandate of the Fifth Amendment.

REASON CERTIORARI SHOULD BE GRANTED

Petitioners feel certiorari should be granted for the following reasons:

1. The Sixth Circuit erred in its interpretation of the *Bruton* and *Harrington* cases.

2. The Sixth Circuit ignored the issue presented on the question of the right to a hearing on a motion to suppress.

CONSTITUTIONAL PROVISIONS RELIED UPON

Constitution of the United States, Amendment V:

"No person shall be . . . deprived of life, liberty or property, without due process of law; . . . ."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

STATEMENT OF THE CASE

Petitioners, James Huel Cravens and Raymond M. Taylor were indicted in a three count indictment along with co-defendant, William Glenn Kilgore (App. B, p. A3). All three were charged with wilfully and knowingly having in their possession a still and distilling apparatus set up and not registered; with wilfully and knowingly carrying on the business of a distiller without having bond; and with wilfully and knowingly making and fermenting 300 gallons of mash, in violation of Sections 5601(a)(1), 5601(a)(4) and 5601(a)(7), Title 26, United States Code.

At the conclusion of the Government's case, co-defendant Kilgore changed his plea to guilty. Thereupon, the case was submitted to the jury which returned a verdict of guilty against petitioners Cravens and Taylor.

Petitioners Cravens and Taylor were sentenced to eighteen months on each of the three counts, with the sentences to run concurrently.

Appeal was duly perfected to the United States Court of Appeals for the Sixth Circuit. On June 20, 1972, the Circuit Court affirmed the convictions. Application was seasonably made to this Court to extend the time to file

this petition for writ of certiorari. An Order was granted by Justice Byron R. White on July 19, 1972, extending the time to and including August 19, 1972.

STATEMENT OF THE FACTS

On May 24, 1971, Special Agent Jimmie K. Canter of the Alcohol, Tobacco and Firearms Division, Internal Revenue Service, U.S. Treasury Department, accompanied by Special Agent Robert Martin, of the same division, began an investigation of an area approximately 5 miles south of Princeton, Kentucky, looking for an illegal still. After observing three men at the site of a barn, Special Agent Canter proceeded to Hopkinsville, Kentucky to procure a search warrant for the aforesaid barn and it was issued on the aforesaid date (App. C, p. A5).

The search warrant was not executed on May 24, 1971, the reason being that the three men had left. On May 25, 1971, only co-defendant Kilgore was seen at the barn. On May 26, 1971, no one came to the barn and the search warrant was executed, a still was discovered, and the petitioners and co-defendant Kilgore were subsequently arrested.

On November 1, 1971, petitioners' court-appointed counsel filed a motion to suppress (App. D, p. A7) and an accompanying memorandum in support thereof (App. D, p. A9). The trial was held on November 2, 1972, and the Trial Court overruled the motion without a hearing (App. E, p. A12). The Government, on November 8, 1971, filed their response to the Motion to Suppress (App. F, p. A14).

During the course of the trial, Special Agent Canter testified as to what co-defendant Kilgore told him while the prisoners were in convoy. An objection was immediately made, and without excusing the jury, the incriminating statement was admitted into evidence, with the

Court giving limiting instructions to the jury (App. G, pp. A22-A23). After the limiting instructions, the incriminating statement was again put into evidence, only in greater detail (App. G, p. A24).

Sheriff Jimmie Jones, of Caldwell County, Kentucky was called by the Government, and was asked to relate the incriminating statement made by co-defendant Kilgore. Again, over objection, the extrajudicial statement was admitted with limiting instructions (App. G, pp. A24-A25).

Co-defendant Kilgore, at the conclusion of the Government's case, entered a plea of guilty to all charges, and was ordered by the Trial Judge to have a seat in the back of the Courtroom (App. G, pp. A27-A29).

ARGUMENT

The facts, the resulting testimony, and the limiting instructions bring this case directly under *Bruton* v. *U. S.*, 391 U.S. 123 (1968), with the only difference being that at the end of the Government's case, the co-defendant, whose extrajudicial statement was admitted into evidence, changed his plea to guilty and was removed from the counsel table.

In *Dutton* v. *Evans*, 91 S.Ct. 210 (1970), Mr. Justice Harlan, speaking for the majority, stated at p. 218:

> "The primary focus of the Court's opinion in *Bruton* was upon the issue of whether the jury in the circumstances presented could reasonably be expected to have followed the trial judge's instructions. The Court found that 'the risk of prejudice in petitioner's case was even more serious than in *Douglas*,' because 'the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury

in a joint trial.' 391 U.S. at 127, 135-136, 88 S.Ct. at 1628. Accordingly, we held that 'in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination.' 391 U.S. at 137, 88 S.Ct. at 1628."

In *Bruton* v. *United States*, 88 S.Ct. 1620 (1968) Mr. Justice Brennan, speaking for the majority, stated at page 1623:

"We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evan's confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse."

In the instant case, the Government attempted to put into evidence co-defendant Kilgore's statement incriminating petitioners. An objection was made after the witness began to give the gist of the statement. The trial judge then gave the pre *Bruton-Delli Paoli* instruction and the statement *in toto* was admitted into evidence. Later in the Government's case, another witness, who was present when co-defendant Kilgore made his statement, began to testify as to the incriminating statement and once again the trial judge gave the pre *Bruton-Delli Paoli* instruction to the jury over the objection of petitioners. And the Sixth Circuit Court of Appeals in its opinion, stated that Bruton did not apply!

It is submitted that *Bruton* does apply, that the jury couldn't follow the limiting instructions, and that confusion reigned supreme when co-defendant Kilgore was re-

moved from the counsel table and seated in the back of the courtroom without any explanation to the jury.

It is submitted that the Sixth Circuit Court of Appeals' reliance on *Harrington* v. *California*, 395 U.S. 250 (1969) is misplaced. In that case, the petitioner made a statement which placed him at the scene of the crime and one of the co-defendants took the stand and was subject to cross-examination. The other two confessions were deemed to be only cumulative. In the instant case, co-defendant Kilgore's statements were not cumulative, in that neither petitioner had made any detailed confession.

It is further submitted that under Rule 41(e) of the Federal Rules of Criminal Procedure, and the Fifth Amendment, the petitioners should have been granted a hearing on their motion to suppress. In *Austin* v. *U. S.*, 297 F.2d 356 (1961), the Court stated at page 360:

> "In summary, we are of the opinion that an individual claiming that evidence was taken from him in violation of either his Fourth or Fifth Amendment rights may bring a proceeding, whether it is styled a 'Rule 41(e) motion,' or an 'independent equity proceeding,' prior to indictment to have his claim adjudicated. Unless his allegations clearly show that, even if true, he would be entitled to no relief, should be given a hearing, and the Court should make findings of facts and conclusions of law."

See also *Hoffretz* v. *U. S.*, 240 F.2d 109 (1956).

CONCLUSION

Petitioner respectfully contends that his right of cross-examination secured by the Sixth Amendment was violated, that this was not harmless error, and that a hearing should have been held on his Motion to Suppress. Therefore, petitioners' convictions should be reversed.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 17th day of August, 1972.

DALE QUILLEN

APPENDIX A

No. 72-1119

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES HUEL CRAVENS AND
RAYMOND M. TAYLOR,
Defendants-Appellants.

Order

(Filed June 20, 1972)

Before: WEICK, PECK and McCREE, Circuit Judge.

Defendants-appellants have perfected this appeal from a judgment of guilty under all counts of a three count indictment pursuant to jury verdict. Their first contention on appeal, that the trial court erred in refusing to suppress evidence seized pursuant to an allegedly invalid search warrant, is concluded to be without merit. Mr. Cravens further contends that the admission into evidence of a confession of one Kilgore, jointly charged in the same three count indictment, constituted prejudicial error.

This contention is based on two grounds, the first of which is that the confession admitted operation of an illegal still not in any way connected with the charges in the present case. This is clearly not true, however, because the confession in fact described the planning and construction of the still which, after having been moved to another site was the subject of the present charges. They next argue inadmissibility because appellants were not present when it was made. However, Kilgore pled

guilty at the conclusion of the Government's case and was present in the courtroom throughout the trial, and hence was available for cross-examination had appellants seen fit to call him to the stand. The situation presented on this record is not violative of *Bruton* v. *United States*, 391 U.S. 123 (1968), and appellants make no such contention. Kilgore's confession was the subject of a strongly worded cautionary instruction to the jury, and we conclude that no error occurred in this regard. However, even had such error been present, in the light of the entire record and the accumulative nature of such statements in the confession as pertained to appellants, the error would have been clearly harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250 (1969). Accordingly,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

Entered by Order of the Court
/s/ James A. Higgins
Clerk

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

No. 4908
(26 U.S.C., Secs. 5601(a)(1), 5601(a)(4), 5601(a)(7))

UNITED STATES OF AMERICA,

vs.

JAMES HUEL CRAVENS, WILLIAM GLENN KILGORE, RAYMOND MILTON TAYLOR.

Indictment

The Grand Jury charges:

FIRST COUNT

On or about and between May 24, 1971, and May 26, 1971, in Caldwell County, in the Western District of Kentucky, JAMES HUEL CRAVENS, WILLIAM GLENN KILGORE and RAYMOND MILTON TAYLOR unlawfully, wilfully and knowingly did have in their possession and custody, and under their control, a still and distilling apparatus set up, which was not registered with the Secretary of the Treasury or his delegate as required by Section 5179, Title 26, United States Code.

In violation of Section 5601(a)(1), Title 26, United States Code.

F nm 10,000 or I nm 5 y or b

The Grand Jury further charges:

SECOND COUNT

On or about and between May 24, 1971, and May 26, 1971, in Caldwell County, in the Western District of Kentucky, JAMES HUEL CRAVENS, WILLIAM GLENN KILGORE and RAYMOND MILTON TAYLOR wilfully and knowingly did carry on the business of a distiller without having given bond as required by Section 5173(a), Title 26, United States Code.

In violation of Section 5601(a)(4), Title 26, United States Code.

F nm 10,000 or I nm 5 y or b

The Grand Jury further charges:

THIRD COUNT

On or about and between May 24, 1971, and May 26, 1971, in Caldwell County, in the Western District of Kentucky, JAMES HUEL CRAVENS, WILLIAM GLENN KILGORE and RAYMOND MILTON TAYLOR wilfully and knowingly did make and ferment approximately 300 gallons of mash fit for distillation and for the production of distilled spirits on premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits.

In violation of Section 5601(a)(7), Title 26, United States Code.

F nm 10,000 or I nm 5 y or b

A True Bill.

/s/ (Illegible)

Foreman

George J. Long

United States Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

Magistrate Docket No. 71-1

Case No. 61

UNITED STATES OF AMERICA,

vs.

JAMES "FAT BOY" CRAVENS,
GLEN KILGORE,
JOHN DOE.

Search Warrant

(Filed June 8, 1971)

To JIMMY K. CANTER, Special Investigator, ATF or any other duly authorized officer

Affidavit having been made before me by

that he has reason to believe that on the premises known as the Hercules McGowan Farm consisting of a one-story unoccupied faded color frame house, a large unpainted barn with two doors painted red and other appurtenances and vehicles and located by going south from Princeton, Kentucky on Ky. 293 for approximately one mile turning right on Grooms' Lane and then going approximately four miles to the intersection of Dulaney Road turning left on Dulaney Road and going approximately .3 of a mile to the first house on the left in Caldwell County, Western Judicial District of Kentucky. Caldwell County in the Western Judicial District of Kentucky there is now being concealed certain property, namely an unregistered distillery

and supplies and apparatus connected therewith mash fit for distillation and distilled spirits on which the tax has not been paid according to law which are fit and intended for use in violation of Sections 5601 (a 7) and Section 5604, Title 26, United States Code. which are in violation of (here give alleged grounds for search and seizure) Sections 5601 (a 7) and Section 5604, Title 26, United States Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 24 day of May, 1971.

/s/ (Illegible)
U. S. Magistrate.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

No. 4908
(26 U.S.C., Secs. 5601(a)(1), 5601(a)(4), 5601(a)(7))

UNITED STATES OF AMERICA,

vs.

JAMES HUEL CRAVENS, WILLIAM GLENN KILGORE
RAYMOND MILTON TAYLOR.

Motion to Suppress Evidence and Controvert Search Warrant

(Filed November 1, 1971)

Defendants, James Huel Cravens, William Glenn Kilgore, and Raymond Milton Taylor, and each of them, move to quash a search warrant issued authorizing a search and to suppress as evidence the articles taken by means of such search and seizure and any evidence gained by means of such search. The grounds for this motion are:

1. The warrant was insufficient on its face.
2. The property seized was not sufficiently described by the warrant.
3. There was no probable cause for beliving the existence of the grounds on which the warrant was issued.
4. By reason of the foregoing, said search and seizure was unreasonable in violation of the Fourth Amendment of the United States Constitution and defendants were compelled to give evidence against them-

selves in violation of the self-incrimination clause of the Fifth Amendment.

Dated: November 1, 1971

Respectfully submitted,

/s/ J. William Graves
J. William Graves
629 Washington Street
Paducah, Kentucky 42001
Attorney for William Glenn Kilgore and Raymond Taylor

/s/ J. Luke Quertermous
J. Luke Quertermous
104 E. Court Square
Princeton, Kentucky 42445
Attorney for James Huel Cravens

Served in accordance with FRCP 5 this the 1st day of November, 1971.

/s/ J. William Graves

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

No. 4908
(26 U.S.C., Secs. 5601(a)(1), 5601(a)(4), 5601(a)(7))

UNITED STATES OF AMERICA,

vs.

JAMES HUEL CRAVENS, WILLIAM GLENN KILGORE, RAYMOND MILTON TAYLOR.

Memorandum in Support of Motion to Suppress Evidence and Controvert Search Warrant

(Filed November 1, 1971)

The defendants, James Huel Cravens, William Glenn Kilgore, and Raymond Milton Taylor, and each of them, rely on *Spinelli* v. *United States*, (1969) 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 in which the Supreme Court gave the following guideline concerning search and seizure: The Government claims that the informant's tip gives a suspicious color to the FBI's reports detailing Spinelli's innocent seeming conduct and that, conversely, the FBI's surveillance corroborates the informant's tip, thereby entitling it to more weight. It is true, of course, that the magistrate is obligated to render a judgment based upon a commonsense reading of the entire affidavit. *United States* v. *Ventresca*, 380 U.S. 102, 108 (1964). We believe, however, that the "totality of circumstances" approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.

"The informer's report must first be measured against *Aquilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aquilar*, the other allegations which corroborate the information contained in the heresay report should then be considered. At this stage as well, however, the standards enunciated in *Aquilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aquilar's* tests without independent corroboration? *Aquilar* is relevant at this stage of the inquiry as well because the tests it establishes were designed to implement the long-standing principle that probable cause must be determined by a 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes *Aquilar's* requirements when standing alone."

Spinelli was followed in *United States* v. *Melvin*, (CA4th 1969) 419 F2d 136. Compare *United States* v.

Mitchell, (CA8th 1970) ..... Fed. ..... (April 14, 1970) (Blackmun, J), relying on *Draper*.

Respectfully submitted,

/s/ J. William Graves
J. William Graves
629 Washington Street
Paducah, Kentucky 42001
Attorney for William Glenn Kilgore and Raymond Milton Taylor

/s/ J. Luke Quertermous
J. Luke Quertermous
104 E. Court Square
Princeton, Kentucky 42445
Attorney for James Huel Cravens

Served in accordance with FRCP 5 this the 1st day of November, 1971.

/s/ J. William Graves

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
KENTUCKY AT PADUCAH

Criminal Action No. 4908

UNITED STATES OF AMERICA,

v.

JAMES HUEL CRAVENS, WILLIAM GLENN KILGORE,
RAYMOND MILTON TAYLOR.

Order

(Filed November 4, 1971)

This case was called in open court on November 2, 1971, and there appeared A. Duane Schwartz, Assistant United States Attorney, and the defendant James Huel Cravens, in person and with counsel, Luke Quertermous, and defendants William Glenn Kilgore and Raymond Milton Taylor, with appointed counsel, William Graves.

Defendants, by counsel, filed a motion to suppress the evidence and controvert the search warrant, and this motion was OVERRULED.

Both sides announced ready for trial, and the following Jury was impaneled and sworn:

Loy Kenneth Allmon	Felix Staton
William L. Jolley, Jr.	B. K. Means
George L. Fielder, Jr.	Henry W. Stice
James M. Carter, Jr.	Glenn Rudolph
Eugene L. Little	James B. McNeely
Clifton M. Mize	Mrs. Catherine Armstrong

Mr. Schwartz read the indictment and stated the case for the government. Mr. Graves stated the case for de-

fendants Kilgore and Taylor. Mr. Quertermous waived opening statement for defendant Cravens.

Evidence was introduced and concluded by the government, at which time defendants, by counsel, moved for a judgment of acquittal, which motion was OVERRULED.

Whereupon, defendant William Glenn Kilgore, by counsel, moved to withdraw his plea of Not Guilty and with leave of Court a plea of Guilty was entered as to this defendant as to the three-count indictment.

Mr. Quertermous argued the case for defendant Cravens; Mr. Graves argued for defendant Taylor; and Mr. Schwartz argued for the government. The Court instructed the Jury and it retired to consider the case at 3:25 p.m. After deliberating, the Jury returned to open court at 3:55 p.m. and announced that they had reach the following verdicts:

"We, the Jury, find the defendant, James Huel Cravens, Guilty as to Count One, Guilty as to Count Two, and Guilty as to Count Three of the indictment.

"We, the Jury, find the defendant, Raymond Milton Taylor, Guilty as to Count One, Guilty as to Count two, and Guilty as to Count Three of the indictment.

November 2, 1971 /s/ Mrs. Catherine Armstrong, Foreman."

The Jury was polled and discharged, and sentence was imposed. Following imposition of sentence, the defendants were advised of their right to appeal in forma pauperis if they were unable to prosecute their appeal otherwise, and of their right to appointed counsel on appeal.

November 2, 1971

/s/ Rhodes Bratcher
Rhodes Bratcher
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

No. 4908

UNITED STATES OF AMERICA

vs.

JAMES HUEL CRAVENS, WILLIAM GLENN KILGORE, RAYMOND MILTON TAYLOR.

Response to Motion to Suppress and Controvert Search Warrant

(Filed November 8, 1971)

Comes the United States of America, by counsel, A. Duane Schwartz, Assistant United States Attorney for the Western District of Kentucky, and in response to the Motion to Suppress and To Quash Search Warrant, filed by defendants, James Huel Cravens, William Glenn Kilgore, and Raymond Milton Taylor, in the present action, states that defendants' Motion to Suppress and to quash is without basis in fact or in law in that the warrant which is the subject of defendants' motion was obtained by a Special Investigator with the Alcohol, Tobacco and Firearms Division of the United States in compliance with the Fourth Amendment to the United States Constitution, and Rule 41(c) of the Federal Rules of Criminal Procedure and was not in violation of the substantive laws of the United States as discussed hereinafter.

To support their Motion to Suppress and Controvert the Warrant defendants rely on *Spinelli* v. *United States*, 393 U.S. 410 (1969), 89 S.Ct. 584, 21 L.Ed.2d 637 as being analogus in fact to the present case. However, the facts

are distinguishable and defendants' reliance upon *Spinelli* is misplaced. In *Spinelli* the warrant was issued primarily upon the "informant's tip" for the observations made by the FBI were of innocent activities. These observations could not independently sustain a Magistrate's finding of probable cause. However, the affidavit in the search warrant here before the Court clearly sets out, independently of the informant's tip, observed illegal acts from which the Magistrate could find probable cause for a search warrant. The instant affidavit contains the following facts from which it is evident probable cause exists:

Jimmy K. Canter, Special Investigator, Alcohol, Tobacco and Firearms Division, received on May 24, 1971, information from Kentucky State Police Detective Ronald Murphy that on May 23, 1971 Detective Murphy had received information from a known reliable source that there was an unregistered distillery in the barn on the Hercules McGowan Farm. This source also stated to Detective Murphy that cartons of one-gallon jugs were in the barn. On May 24, 1971, at about 1:25 P. M., Special Investigator Canter, Special Investigator Robert Martin and Detective Murphy were in a wooded area at a point about 100 yards west of the McGowan barn. At that time they observed two men sitting in a parked 1956 Chevrolet situated approximately 50 yards northwest of the barn. Using binoculars Detective Murphy identified the two men as James "Fat Boy" Cravens and Glen Kilgore. At approximately 1:45 P.M. Cravens left the car and went down and entered the barn, remaining inside the barn until about 2:05 P.M. when he drove out from behind the barn in a 1963 white Oldsmobile. At that time Kilgore went down and entered into the barn. A third man come out of the barn for a few seconds and then reentered the barn. While Special Investigator Canter was observing the barn through

binoculars, heat waves appeared to be coming from an opening in the roof. At that point Canter smelled what appeared to be fermenting mash. Canter was aware of James "Fat Boy" Cravens' reputation of handling non-tax paid distilled spirits.

From the facts it is evident that *Spinelli* is not analogus to the present case. Unlike *Spinelli* the affidavit before Magistrate Dixon clearly stated personal observations made by the ATF in addition to the information given by a known reliable informant. Not withstanding the informant's tip, the observation by the officers of a known liquor law violator entering the McGowan barn from which heat waves were seen to be emanating and from which the officers "smelled fermenting mash" was sufficient for a Magistrate to find probable cause. In *United States* v. *Jordon*, 349 F.2d 107 (C.A.6, 1965) probable cause was found when officers, during surveillance of defendant's house, observed the transfer of jugs customarily used in illicit liquor traffic, detected odor of mash emanating from premises and observed unloading of what appeared to be large bags of sugar; see also *United States* v. *Hoskins*, 345 F.2d 111 (C.A.6, 1965); *United States* v. *Meeks*, 313 F.2d 464 (C.A.6, 1963); *United States* v. *Hooper*, 320 F.Supp. 507 (E.D.Tenn., 1969); *United States* v. *Parham*, 17 F.R.D. 301 (D.C.Mich., 1955).

WHEREFORE, for the foregoing reasons plaintiff respectfully requests this Court to dismiss defendants' Motion to Suppress.

United States of America
George J. Long
United States Attorney
By /s/ A. Duane Schwartz
A. Duane Schwartz
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Motion to Suppress and Controvert Search Warrant was this 5th day of November, 1971, mailed to Hon. J. William Graves, 629 Washington Street, Paducah, Kentucky 42001, attorney for defendants.

/s/ A. Duane Schwartz
A. Duane Schwartz

APPENDIX G

Excerpts from Transcript of Testimony

(November 2, 1971)

(Tr. 60-71)

Jimmie K. Canter—Direct Examination

BY MR. SCHWARTZ:

Q. Upon the arrest of Mr. Cravens and Mr. Kilgore, is that correct—

A. (Interrupting) Yes, sir.

Q. (Continuing) —what did you then do with the men?

A. Immediately upon putting them under arrest, I read them their statement of rights and I made a physical search of each individual.

Q. Did you find anything?

A. The search was, of course, for weapons. Yes, sir. In the front right pocket of Mr. Cravens I found a loaded—

MR. QUERTERMOUS: (Interrupting) Objection. Objection.

MR. GRAVES: He's not being tried for that, Your Honor.

BY THE COURT: Well, unless it has something to do with this—

MR. SCHWARTZ: (Interrupting) We withdraw the question.

BY THE COURT: Sustained.

Q. Did you then take them in to process them?

A. Yes, sir.

Q. Where did you take them?

A. Along with Sheriff Jones and Deputy Ladd, we proceeded down to the Caldwell County Courthouse there in Princeton and went into the Sheriff's office. There we were met by the Kentucky State Police Detective Raymond Jones. Sheriff Jones, his Deputy and Investigator Martin and Detective Murphy then left the courthouse to attempt to locate the other individual that we were looking for.

Q. All right, sir. Now, while you were in—where were you located there?

A. The Sheriff's office, Caldwell County Courthouse at Princeton.

Q. All right, sir. While you were in the Sheriff's office, do you recall whether or not any of the defendants made any statements to you or you asked them any questions?

A. Yes, sir. While we were at the courthouse processing, fingerprinting, taking pictures, obtaining general information there, Cravens did state to me, "Why don't you get that big rig down the road. I have a little twelve-barrel outfit and will probably go to the pen."

Q. Sir? What else? I didn't—would you repeat that? I didn't exactly understand that.

A. Mr. Cravens stated, "Why don't you get that big outfit down the road?"

MR. QUERTERMOUS: Objection.

BY THE COURT: Well, I don't see what relevance it has. What big outfit are you talking about?

MR. SCHWARTZ: Your Honor, we have to give the entire statement to make it relevant.

BY THE COURT: Well, I don't know about that. If it's not competent, we don't have to hear any of it.

MR. SCHWARTZ: Well, all right. Then we'll come up by avowal and give it to you.

BY THE COURT: Well, I don't see what—

MR. SCHWARTZ: (Interrupting) It's a statement—

BY THE COURT: (Interrupting) I know what it is. Come up here.

(WHEREUPON, AT THIS POINT THERE WAS A DISCUSSION OFF THE RECORD BETWEEN THE COURT AND COUNSEL AT THE BENCH OUT OF THE HEARING OF THE JURY, AFTER WHICH THE FOLLOWING PROCEEDINGS OCCURRED IN OPEN COURT.)

BY THE COURT: Overruled—sustain the objection.

Q. Mr. Canter, in the statement—you did say he made a statement to you?

A. Verbal statement, yes, sir.

Q. All right, sir. In his statement to you, did he indicate that he was operating—

MR. GRAVES: (Interrupting) Wait.

MR. QUERTERMOUS: Objection.

MR. GRAVES: Leading.

BY THE COURT: Sustained.

MR. GRAVES: He's leading, putting words in his mouth there.

BY THE COURT: I've sustained the objection. Proceed.

MR. SCHWARTZ: We cannot get into the statement which the gentleman made?

BY THE COURT: If you can qualify it. If you can't under the rules, you can't.

Q. Mr. Canter, did he indicate that he was operating—

BY THE COURT: (Interrupting) No. Mr. Schwartz, you can't—you can't signal the answer to him in advance.

Q. Mr. Canter, what did Mr. Cravens tell you?

A. Mr.—

MR. GRAVES: (Interrupting) Well, that is too general, Your Honor. I object.

BY THE COURT: No. I'll let him testify. I might have to caution the jury to disregard it, but—did he volunteer this statement?

THE WITNESS: Yes, sir.

BY THE COURT: It wasn't an answer to an interrogation?

THE WITNESS: No, sir.

BY THE COURT: And did it have to do with the offense charged here?

THE WITNESS: I think it's relevant, yes, sir.

MR. SCHWARTZ: Your Honor, how—

MR. QUERTERMOUS: (Interrupting) Your Honor—

MR. SCHWARTZ: (Continuing) —how are we going to say—

BY THE COURT: (Interrupting) Wait a minute. Everybody is talking at once. One at a time, please.

We'll have a five-minute recess. I'll take this matter up in chambers.

(WHEREUPON, AT THIS POINT THERE WAS A SHORT RECESS DURING WHICH THERE WAS A DISCUSSION IN CHAMBERS, THEN THE FOLLOWING PROCEEDINGS OCCURRED IN OPEN COURT.)

BY THE COURT: The objection was overruled. You may proceed.

Q. Mr. Canter, drawing your attention again to the statement which was made to you by Mr.—what's the man's name

A. Cravens.

Q. (Continuing)—Cravens, what did he tell you?

A. He said, "Why don't you get that big rig down the road? I only had a little twelve-barrel outfit and will probably go to the pen."

Q. All right, sir. Did he make any other statements to you?

A. No, sir; not at that time.

Q. Did any other defendant make any statement to you in your presence?

A. Not at that time. I was later—later, yes.

MR. GRAVES: Judge, he's leading, and the witness is not being responsive to the questions he's asking.

BY THE COURT: Well, he just asked him if he made any other statements. I don't know how that's leading.

MR. GRAVES: And so the witness says "Not at that time", meaning of course to signal that at some other time, ask me about that. That's the inference I get from that line of questioning and answering.

BY THE COURT: Go ahead. Overruled. I think he's being very responsive. He said, "No, not at that time".

Q. All right. What was the occasion that a statement was made to you by another man?

A. Yes, sir. Later that same evening, accompanied by State Police Detective Murphy and one of the defendants, Mr. Glenn Kilgore, we were en route to Paducah to lodge the prisoners when in convoy with Investigator Martin and other officers and the other prisoners, Mr. Kilgore was in the car with Detective Murphy and I and he made several statements while we were en route to Paducah.

Q. What were you going to Paducah for?

A. We were going to Paducah to lodge the three defendants until the next day so we could take them before the U. S. Magistrate.

Q. All right. What did Mr. Kilgore tell you?

A. While we were en route down to Paducah, Mr. Kilgore advised that he, along with Mr. Cravens and Mr.—

MR. QUERTERMOUS: (Interrupting) Objection.

BY THE COURT: Let's hear it. Go ahead. Overruled.

THE WITNESS: That he—

MR. QUERTERMOUS: (Interrupting) Objection, Your Honor.

THE WITNESS: Stated that he, Mr. Cravens, Mr. Taylor had had this still set up behind Mr. Cravens' home before we raided the one in the barn, same still.

MR. QUERTERMOUS: Objection.

BY THE COURT: Now, what's the basis of the objection.

(WHEREUPON, AT THIS POINT THE FOLLOWING PROCEEDINGS OCCURRED AT THE BENCH BETWEEN THE COURT AND COUNSEL OUT OF THE HEARING OF THE JURY.)

MR. QUERTERMOUS: The basis of the objection is that the prosecution has not shown that the statement was made in the presence of either Mr. Cravens or Mr. Taylor. The statement has been to the jury and, regardless of any admonition of the Court, they have heard it. And I don't see how it can be removed. And I move the Court at this time for a mistrial.

MR. GRAVES: Cravens denies he was there.

MR. SCHWARTZ: Your Honor, this statement is competent and relevant to the guilt of Kilgore with the instruction, if upon counsel's objections that instruction be given that the jury should not regard it as being—showing

any guilt or—or guilt on the part of the other two defendants, but merely as the guilt of Kilgore.

MR. QUERTERMOUS: Well, the statement certainly implicated them.

MR. SCHWARTZ: Well, I know. But you can't synthesize the statement out to get the other defendants out of it.

BY THE COURT: All right. I think that's qualified and I think it would be competent.

(WHEREUPON, THE FOLLOWING PROCEEDINGS OCCURRED IN OPEN COURT.)

BY THE COURT: Ladies and gentlemen of the jury, you've heard the question and the answer. You will not consider his answer as to the guilt, as to the statement that Kilgore made not in the presence of these other two, and the statement was not made in the presence of the other two defendants, in any way to implicate them or as to their guilt of these charges but only insofar as it affects the guilt or innocence of the defendant Kilgore who made the statement himself. In other words, he—his statement concerning his implication, you can use it for that. But his—his statement to the implication of the other two defendants, you cannot use it against those defendants. Do you understand?

Proceed.

THE WITNESS: Yes, sir.

Q. What was the full statement? I don't think you finished it.

A. He made several statements—

BY THE COURT: (Interrupting) Well, now, let's don't keep going over it.

MR. SCHWARTZ: Well, Your Honor, he did not—he was interrupted prior to finishing the statement given by Mr. Kilgore. The objection interrupted his testimony.

BY THE COURT: Go ahead.

THE WITNESS: His—

BY THE COURT: (Interrupting) Go ahead.

THE WITNESS: He advised, along with Cravens and Taylor that he operated the still behind Cravens' home. They'd made two previous runs there. Stated that they had moved the still this past Saturday out to the barn. He advised they moved the still along with some mash. He advised they ran off six barrels of mash on Monday and that they had received a poor run, making only 26 gallons of whiskey. He stated that he was paid for each six-barrel run, stating that the whiskey was divided between Mr. Cravens and Mr. Taylor. He said that Taylor had furnished the copper condenser and the cooling tank of the still, Cravens supplied the bottle gas and bought the cooking pot in Hopkinsville, Kentucky.

Q. All right, sir. Now, do you recall whether or not, again, you were able to find any registration or designation of bond for that particular still?

A. No, sir; there was none.

Q. No further questions.

BY THE COURT: You may ask him.

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(Tr. 112-115)

Jimmie Jones—Direct Examination

BY MR. SCHWARTZ:

A. I helped A.T.U. Agent Jimmie Canter. We went out to the residence of Jimmie Cravens, and I arrested Jimmie and Glenn Kilgore.

Q. All right, sir. Were these men advised of their rights?

A. Yes, sir; they were.

Q. By whom?

A. Agent Jimmie Canter.

Q. All right, sir. Did either of these men make any statements to you after being advised of their rights?

A. I didn't take any statement from them myself, no, sir.

Q. All right. Did they make any oral statements?

A. Yes, sir; they did that.

Q. Who made a statement to you?

A. Well, Glenn Kilgore did first and—

Q. (Interrupting) What did he say to you, sir?

A. He just told us, you know, that he was at the still and that—said they'd been operating it about two weeks before they moved it to this site and said they'd run off one batch.

MR. QUERTERMOUS: Objection.

MR. GRAVES: I think a foundation should be laid as to who was present when this statement by Kilgore was made. As I understand, Cravens and Taylor weren't there.

MR. QUERTERMOUS: And—may I approach the bench?

(WHEREUPON, AT THIS POINT THERE WAS A DISCUSSION OFF THE RECORD BETWEEN THE COURT AND COUNSEL AT THE BENCH OUT OF THE HEARING OF THE JURY, AFTER WHICH THE FOLLOWING PROCEEDINGS OCCURRED IN OPEN COURT.)

BY THE COURT: Overruled. Proceed.

Q. All right, sir. Now, did you ask Mr. Kilgore any questions at this point on May the 26th, 1971, upon his arrest?

A. The only question I asked him is about where the third party was.

Q. Did he answer you?

A. Yes, sir; he did.

Q. What did he tell you?

A. He told me he was just up the road, and I said, "Well," I said, "I don't know who you're talking about." And he told me Raymond Taylor, or he called him Ray Taylor. That's what he called him. And I asked him where he lived, and he told me where he did live.

Q. All right, sir. Now, did the defendant Cravens ever make any statements to you at any time relative to this particular instance about what they're charged with today?

A. Not at the time of the arrest. But later on Jimmie talked to me on the matter.

Q. What did he tell you?

A. He just—seemed to me we were in the courthouse and he just made the remark, says, "I'm the unluckiest fellow in the world. Set up a little outfit and a big one running on down the road, they didn't get."

Q. All right, sir. No further questions.

BY THE COURT: Now, ladies and gentlemen of the jury, you recall the caution and admonition that the Court gave you concerning the admission while ago of one of the defendants. You will still continue to be governed by that. The admission of the defendants can only be used and weighed by you as it pertains to the one making the statement, and implication of guilt of someone else, you won't consider that by only his own statement against his own interests. I can't admit that someone else is guilty. I can admit that I am, though. Is that satisfactory?

MR. QUERTERMOUS: Yes, sir.

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(Tr. 123-127)

Colloquy

MR. GRAVES: Could we approach the bench, please?

(WHEREUPON, AT THIS POINT THE FOLLOWING PROCEEDINGS OCCURRED AT THE BENCH OUT OF THE HEARING OF THE JURY BETWEEN THE COURT AND COUNSEL.)

MR. GRAVES: Let the Clerk make a notice on change of plea on Kilgore. That will take care of him.

BY THE COURT: Mr. Kilgore, come around, please.

(WHEREUPON, AT THIS POINT DEFENDANT KILGORE AND HIS COUNSEL CONFER AT THE BENCH WITH THE COURT OUT OF THE HEARING OF THE JURY AS FOLLOWS.)

BY THE COURT: According to the information and the statements that your attorney just has made to the Court, he indicates that you desire at this stage of the proceedings to change your plea from one of not guilty to guilty.

MR. KILGORE: Yes, sir.

BY THE COURT: I believe I'll let the jury be excused for ten minutes.

(WHEREUPON, THE FOLLOWING PROCEEDINGS OCCURRED IN OPEN COURT.)

BY THE COURT: I'm going to let you be excused for ten minutes. Don't talk about the case. Just remember the reprimand that's been given here by the Court. We're nearing the conclusion of the trial. We don't need anything to contaminate the record to prevent getting a final judgment and a hearing by the jury in this case.

(WHEREUPON, AT THIS POINT THE JURY LEFT THE COURTROOM AND THE FOLLOWING PROCEEDINGS OCCURRED IN OPEN COURT.)

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BY THE COURT: Mr. Kilgore, are you aware that under the three counts of this indictment—are you ready to proceed in this matter now?

MR. SCHWARTZ: Your Honor, we could—we could, of course, withhold sentencing until the other—the other defendants, a verdict comes back, rather than taking it piecemeal. Of course, they may be acquitted. But I am ready if Your Honor so desires to go ahead and dispose of the matter.

BY THE COURT: Well, I wasn't interested in so much whether you were ready or not as to whether or not you agree to the propriety—

MR. SCHWARTZ: (Interrupting) I do not agree with the propriety. Certainly a defendant is allowed to change his plea at any time during the proceedings. However, I would like from the standpoint of sitting there this long, the other defendants obviously will say it made some type of effect on their case, and I think—

BY THE COURT: (Interrupting) Well, Mr. Kilgore, you're aware that the Court could give you up to 30 years—up to $30,000.00 in fines and up to 15 years in the penitentiary inasmuch as you could receive $10,000.00 in fines and up to five years on each one of the three counts of a three-count indictment here and that it is within the province of the Court to impose maximum sentence on you if he so desires?

MR. KILGORE: Yes, sir.

BY THE COURT: You understand that?

MR. KILGORE: Yes, sir.

BY THE COURT: Now, has anyone made you any promises that the Court might be lenient to you if you would change your plea at this stage?

MR. KILGORE: No, sir.

BY THE COURT: You are aware that no one could obligate the Court by such a statement?

MR. KILGORE: Yes, sir.

BY THE COURT: That it's strictly up to me to pronounce the sentence?

MR. KILGORE: Yes, sir.

BY THE COURT: Has anyone threatened you—

MR. KILGORE: (Interrupting) No, sir.

BY THE COURT: (Continuing) —as to some disastrous consequence that might result to you if you did not change your plea?

MR. KILGORE: No, sir.

BY THE COURT: So you are only doing this because you are guilty as charged in this indictment and for no other reason?

MR. KILGORE: Yes, sir.

BY THE COURT: You are doing this of your own free will and accord?

MR. KILGORE: Yes, sir.

BY THE COURT: All right. Let his plea be changed.

Now, I believe it will be better, just let him resume his seat back—he'll be in custody of the Marshal, but let him resume his seat back in the courtroom wherever you may desire, over at the side and disassociate him with these other defendants and these attorneys during the trial of the case. Just have a seat over there.

All right. You may call the jury back in.

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